UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN BRYAN LARSON, member of NTC Colorado, LLC, former member of ITA Colorado, LLC, doing business as Premier Title Agency of Colorado, and ALICIA LYNN LARSON, also known as Alicia Lynn Velasquez, former member of NTC Colorado, LLC, member of NTA Colorado, LLC, doing business as Premier Title Agency of Colorado, Debtors.	BAP No. CO-12-006
ALLIANT NATIONAL TITLE INSURANCE COMPANY, INC., a Colorado Corporation, Plaintiff – Appellee, v. JOHN BRYAN LARSON and ALICIA LYNN LARSON, Defendants – Appellants.	Bankr. No. 10-39976 Adv. No. 11-01222 Chapter 7 ORDER DISMISSING APPEAL March 9, 2012

Before CORNISH, KARLIN, and SOMERS, Bankruptcy Judges.

The matter before the Court is the Appellants John Bryan Larson and Alicia Lynn Larson's Motion for Leave to Appeal the United States Bankruptcy Court for the District of Colorado's January 10, 2012 Interlocutory Order and Judgment Denying Motion for Protective Order Regarding Plaintiff's First Set of Written Discovery to Defendants and Subpoena for Deposition of Defendants, filed January 24, 2012 ("Motion for Leave"). The Appellee, Alliant National Title Insurance Company, Inc., opposes the Motion for Leave. For the reasons set forth below, the Motion for Leave is denied, and this appeal is dismissed.

Appellants Alicia and John Larson, who respectively owned and were employed by Premier Title Agency of Colorado ("Premier"), filed a Chapter 13 petition that was later converted to Chapter 7. Appellee filed a non-dischargeability action against Appellants under 11 U.S.C. §§ 523(a)(2) and (4) (the "Adversary"), seeking to except from discharge the amount for which it had become liable for as a result of Appellants' alleged misappropriation of seven Premier escrow funds. Pursuant to an agreement between Appellee and Premier, Appellee had underwritten residential real estate transaction title insurance policies for which Premier acted as escrow agent.

Appellants moved to stay the Adversary after they and their attorney were informed by the Attorney General for the State of Colorado that they were "the subject of a criminal investigation related to their actions as owner and employee of Premier Title," claiming that proceeding with the Adversary would force them to choose either to waive their Constitutional protection from compelled self-incrimination, or assert that protection and thereby compromise their position in the Adversary.[1] Appellants also sought a protective order from Appellee's discovery requests and deposition subpoenas based on that information from the Colorado Attorney General.[2] On January 10, 2012, the bankruptcy court issued its Order Denying Defendants' Motion for Protective Order Regarding Plaintiff's First Set of Written Discovery to Defendants and Subpoena for Deposition of Defendants ("Order"). Appellants filed their notice of appeal and accompanying Motion for Leave, seeking review of the Order.

II. This case does not meet the "exceptional circumstance" test for granting leave to appeal.

---

[1] Appellants also sought leave to appeal the Bankruptcy Court's January 10, 2012, Order Denying Defendants' Motion for Stay of Adversary Proceeding; we denied that motion in a published order entered this same date in BAP Appeal No. CO-12-005 on grounds similar to the instant application.

[2] *Motion for Leave* at 4, ¶ 13.

This Court has jurisdiction to hear appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders.[3] An order is final "only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[4] The Order is not final and the collateral order doctrine does not apply to discovery orders.[3]

As such, this Court may exercise jurisdiction over the Order only if leave of court is appropriate pursuant to 28 U.S.C. § 158(a)(3). As this Court has stated:

> Leave to hear appeals from interlocutory orders should be granted with discrimination and reserved for cases of exceptional circumstances. Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate termination of the litigation.[4]

For the reasons outlined below, Appellants have demonstrated neither a controlling question of law as to which there is a substantial ground for difference of opinion, nor that immediate resolution of their Fifth Amendment claim will materially advance the ultimate termination of the litigation. First, because there is Tenth Circuit Court of Appeals authority on the presenting issue, there appears to be no "question of law as to which there is a substantial ground for difference of opinion." In *Bailey v. Connolly*,[5] the Tenth Circuit held that delaying review of the constitutional interest against self-incrimination "does not imperil" that interest enough "to justify the cost of allowing immediate appeal" of the relevant

---

[3] 28 U.S.C. § 158(a)(3).

[4] *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945).

[3] *Joseph v. Lindsey (In re Lindsey)*, 212 B.R. 373, 374-75 (10th Cir. BAP 1997).

[4] *Personette*, 204 B.R. at 769 (citing 28 U.S.C. § 1292(b)).

[5] 361 F.App'x 942, 948-49 (10th Cir. 2010).

orders. Noting that criminal defendants cannot appeal constitutional violations on an interlocutory basis, but must wait until after they are convicted, the Circuit stated that the "constitutional interest in being free of self-incriminating statements is not 'important' enough in the *Cohen* sense to justify an interlocutory appeal of the [civil discovery] order."[6]

Furthermore, parties seeking to invoke the constitutional protection under the Fifth Amendment that bars compelled self-incrimination are required to demonstrate that a deposition question or written discovery gives them "reasonable cause to apprehend danger," that their response would either "support a conviction," or "furnish a link in the chain of evidence needed to prosecute them for a violation of the criminal statutes."[7] In addition, Appellants are subject to the requirements of Federal Rule of Civil Procedure 26(b)(5). Nothing in the appellate record suggests that Appellants have met this standard in regard to Appellee's discovery requests.

In any event, allowing a blanket stay of discovery in the Adversary could not possibly "materially advance the ultimate termination of the litigation."[8] To the contrary, such a stay would bring those proceedings to a halt. Since Appellants did not know when, or if, they would be criminally charged, the Bankruptcy Court properly acknowledged that it could not grant a protective order on the basis of "a speculative and general assertion of the Fifth Amendment

---

[6] *Id.* at 949 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994)). *Cohen* orders or doctrine are references to *Cohen v. Beneficial Indus. Loan Corp*, 337 U.S. 541 (1949). *See also Mid-Am.'s Process Serv. v. Ellison*, 767 F.2d 684, 687 (10th Cir. 1985) (propriety of postponement of civil discovery pending resolution of ongoing grand jury proceeding on same facts is a matter of trial court's discretion and, though postponement might be appropriate in some civil cases, it is not required).

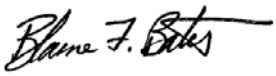
[7] *See United States v. Schmidt*, 816 F.2d 1477, 1481 (10th Cir. 1987) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

[8] *Personette* at 769.

to every aspect of discovery instead of specific and individual assertions of the Fifth Amendment privilege."[9] As the Supreme Court stated in *Hoffman*, Appellants are "not exonerated from answering merely because [they declare] that in so doing [they] would incriminate [themselves—their] say-so does not of itself establish the hazard of incrimination."[10] Appellants will need to evaluate for themselves, when actually faced with the need to invoke their Fifth Amendment privilege, whether or not to do so. At that time, the Bankruptcy Court will (likely upon Appellee's proper motion to compel) be in a position to evaluate whether the fear of incrimination is substantial and real, and how best to proceed.

Accordingly, because Appellants have not shown exceptional circumstances justifying an interlocutory appeal, it is HEREBY ORDERED that the Motion for Leave is DENIED. This appeal is DISMISSED.

For the Panel:



Blaine F. Bates
Clerk of Court

---

9 *Order* at 4, ¶ C.

10 *Hoffman* at 486.